

IN THE UNITED STATES ARMY  
FIRST JUDICIAL CIRCUIT

UNITED STATES )  
v. ) DEFENSE RESPONSE TO  
MANNING, Bradley E., PFC ) GOVERNMENT MOTION FOR  
U.S. Army, (b) (6) ) AUTHORIZATION OF  
Headquarters and Headquarters Company, U.S. ) REDACTIONS OR  
Army Garrison, Joint Base Myer-Henderson Hall, ) SUBSTITUTIONS FOR THE FBI  
Fort Myer, VA 22211 ) FILE, ONCIX DAMAGE  
 ) ASSESSMENT, DIA RECORDS,  
 ) AND CIA REPORT  
 ) DATED: 21 August 2012

RELIEF REQUESTED

1. The Defense requests that this Court deny any proposed redactions or substitutions from the Federal Bureau of Investigation (FBI) file, the Office of the National Counterintelligence Executive (ONCIX) Damage Assessment, the identified Defense Intelligence Agency (DIA) records, and the identified Central Intelligence Agency (CIA) reports where, considering the mindset of Defense counsel (including the questions referenced herein), the Court concludes that the classified information itself is necessary to enable the accused to prepare for trial. The Defense further requests that the Court Order the Government to request ONCIX to provide updated versions of its damage assessment as they become available for the Court's review until a final damage assessment is completed.

EVIDENCE

2. The Defense does not request any witnesses for this motion, but does request that the Court consider Appellate Exhibit IX, XXXVI, CXVI, CXLVI, CXLVII, and CLXXXII for the purposes of this motion.

FACTS

3. The FBI, ONCIX, DIA, and CIA have not claimed a privilege under MRE 505(c). Therefore, the documents being considered by the Court are governed by *Brady*/RCM 701(a)(2), RCM 701(a)(6), RCM 703(f), and MRE 505(g)(2).

4. The Court has found that the FBI, ONCIX, DIA, and CIA are "closely aligned" with the Government in this case. Appellate Exhibit XXXVI, p. 11. The Court has also found that the

“Defense has shown that the FBI file (minus grand jury testimony) to the extent relevant to an investigation of PFC Manning, is material to the preparation of the Defense to the extent that it is relevant and necessary for production under RCM 703(f).” Appellate Exhibit CXLVII, p. 6.

## ARGUMENT

5. The Government’s non-*ex parte* filing requests the Court to authorize redactions and substitutions under MRE 505(g)(2). Specifically, the Government requests the following:

- a) FBI file. The Government asserts that the redacted portions “are not relevant and necessary for production under RCM 703(f).” *See* Prosecution Disclosure to the Defense, dated 3 August 2012.
- b) ONCIX damage assessment. The government maintains that the redacted information is “neither favorable to the accused and material to guilt or punishment, nor relevant and necessary for production under RCM 703(f).” *Id.*
- c) DIA Records. The Government requests approval of redactions from DIA records that it maintains “neither involve investigation, damage assessment, or mitigation measures nor are otherwise subject to discovery or production under Brady, RCM 701(a)(2), RCM 701(a)(6), or RCM 703(f).” *Id.*
- d) CIA Report. The Government requests authorization of a substitution for a portion of the CIA report that is “favorable to the accused and material to guilt or punishment or relevant and necessary for production under RCM 703(f).” *Id.*

6. As part of its request, the Government provided redacted versions of its *in camera* motions for authorization of redactions or substitutions. *Id.* The redacted versions provided the following detail:

- a) FBI file. The Government has indicated that it will not use the redacted portions of the FBI file during any portion of the trial. *Id.*
- b) ONCIX damage assessment. The Government informed the Court that the ONCIX damage assessment is still a draft document. *Id.* Within the redacted *in camera* motion, the Government informs the Court that it reviewed the “most-current” ONCIX damage assessment on 3 August 2012. The Government determined that the report “contained information that was favorable to the accused and material to guilt or punishment.” *Id.* The Government, however, does not provide an estimate of when ONCIX envisions completing the damage assessment. ONCIX had previously indicated that it believed it might have a completed copy of its damage assessment by 3 August 2012. *See* Enclosure 2 to Appellate Exhibit CXIX. Finally, the Government indicates that it will not use redacted portions of the ONCIX damage assessment during any portion of the trial. *See* Prosecution Disclosure to the Defense, dated 3 August 2012.
- c) DIA Records. The Government has indicated that it will not use the redacted portions of the FBI file during any portion of the trial. *Id.*
- d) CIA Report. The Government states that it became aware of an additional CIA damage assessment on 11 July 2012. *Id.* The Government reviewed the report on 13 July 2012

and determined that it “contained information that was favorable to the accused and material to guilt or punishment.” *Id.*

7. The Government requests this Court to approve of its determination that the Defense is not entitled to discovery of the redacted or substituted information. In considering whether the proposed substitutions or redactions are sufficient, the Court must determine if the disclosure of the classified information itself is necessary to enable the accused to prepare for trial. MRE 505(g)(2). In making this determination, the Defense requests that this Court consider the analysis proposed by the Defense in Appellate Exhibit CLXXXII and the following factors adopted by the Court in Appellate Exhibit CXLVI:

- a) What is the extent of the redactions/substitutions?
- b) Has the Government narrowly tailored the substitutions to protect a Governmental interest that has been clearly and specifically articulated?
- c) Does the substitution provide the Defense with the ability to follow-up on leads that the original document would have provided?
- d) Do the substitutions accurately capture the information within the original document?
- e) Is the classified evidence necessary to rebut an element of the 22 charged offenses, bearing in mind the Government’s very broad reading of many of these offenses?
- f) Does the summary strip away the Defense’s ability to accurately portray the nature of the charged leaks?
- g) Do the substitutions prevent the Defense from fully examining witnesses?
- h) Do the substitutions prevent the Defense from exploring all viable avenues for impeachment?
- i) Does the Government intend to use any of the information from the damage assessments? Is so, is this information limited to the summarized document provided by the Government? If the information intended to be used by the Government is not limited to the summarized document, does the Defense in fairness need to receive the classified portions of the documents to put the Government’s evidence in proper context?
- j) Does the original classified evidence present a more compelling sentencing case than the proposed substitutions by the Government?
- k) Do the proposed substitutions prevent the Defense from learning names of potential witnesses?
- l) Do the substitutions make sense, such that the Defense will be able to understand the context?
- m) Is the original classified evidence necessary to help the Defense in formulating defense strategy and making important litigation decisions in the case?
- n) Is it unfair that the Government had access to the unclassified version of the damage assessment and the Defense did not? Does that provide a tactical advantage to the Government?

### CONCLUSION

8. The Defense requests that this Court deny any proposed redactions or substitutions from the FBI file, the ONCIX Damage Assessment, the identified DIA records, and the identified CIA

reports where, considering the mindset of Defense counsel (including the questions referenced herein), the Court concludes that the classified information itself is necessary to enable the accused to prepare for trial. Finally, the Defense requests that the Court Order the Government to request ONCIX to provide updated versions of its damage assessment as they become available for the Court's review until a final damage assessment is completed.

Respectfully submitted,



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